

Additional information concerning Restrictive Markings extracted from the references essential to perform these tasks:

1. U.S. law ([10 U.S.C. 2320](#)) requires contractors to provide unlimited rights in data for items developed exclusively at Government expense. If the items were developed exclusively at private expense, the contractor may restrict the Government's rights. Normally, an item is developed with both Government and private funds. In this case, data rights are negotiated and established as early as possible.
2. Contractors must identify restrictive markings in their proposal for inclusion in a contract. According to DFARS:
  - 2.1. The solicitation provision at DFARS [252.227-7017](#), Identification and Assertion of Use, Release, or Disclosure Restrictions, requires offerors to identify to the contracting officer, prior to contract award, any technical data that the offeror asserts should be provided to the Government with restrictions on use, modification, reproduction, release or disclosure.
  - 2.2. The restrictions asserted by a successful offeror shall be attached to its contract unless, in accordance with the procedures at DFARS [227.7103-13](#), the parties have agreed that an asserted restriction is not justified. The contract attachment shall provide the same information regarding identification of the technical data, the asserted rights category, the basis for the assertion, and the name of the person asserting the restrictions as required by paragraph (d) of the solicitation provision at DFARS [252.227-7017](#). Subsequent to contract award, the clause at DFARS [252.227-7013](#), Rights in Technical Data--Noncommercial Items, permits the contractor to make additional assertions under certain conditions.
3. The Government ultimately decides whether to accept restrictive markings. DCMA PA personnel should identify and request that the ACO challenge improper restrictions (as evidenced by unjustified markings) on the Government's ability to use the data. This activity should occur throughout a system's life cycle with the understanding that challenges are more likely to succeed before a product baseline is established at CDR.
  - 3.1. Under [10 U.S.C. 2321](#), the Government has the right (and responsibility) to challenge asserted restrictions when there are reasonable grounds to question the validity of the assertion and continued adherence to the assertion would make it impractical to later procure competitively that item.
  - 3.2. Neither the pre- or post-award assertions made by the contractor, nor the fact that certain assertions are identified in the attachment to the contract, determine the respective rights of the parties. As provided at DFARS [227.7103-13](#), the Government has the right to review, verify, challenge and validate restrictive markings.
  - 3.3. Unjustified markings.
    - 3.3.1. An unjustified marking is an authorized marking that does not depict accurately restrictions applicable to the Government's use,

modification, reproduction, release, performance, display, or disclosure of the marked technical data. For example, a limited rights legend placed on technical data pertaining to items, components, or processes that were developed under a Government contract either exclusively at Government expense or with mixed funding (situations under which the Government obtains unlimited or government purpose rights) is an unjustified marking.

- 3.3.2. Contracting officers have the right to review and challenge the validity of unjustified markings. However, at any time during performance of a contract and notwithstanding existence of a challenge, the contracting officer and the person who has asserted a restrictive marking may agree that the restrictive marking is not justified. Upon such agreement, the contracting officer may, at his or her election, either—
    - 3.3.2.1. Strike or correct the unjustified marking at that person's expense; or
    - 3.3.2.2. Return the technical data to the person asserting the restriction for correction at that person's expense. If the data are returned and that person fails to correct or strike the unjustified restriction and return the corrected data to the contracting officer within 60 days following receipt of the data, the unjustified marking shall be corrected or stricken at that person's expense.
4. Subcontractor rights in technical data are established by law. A prime contractor may not coerce a subcontractor into providing proprietary data, however, Government access to subcontractor data is not restricted. This aspect of the law emphasizes the need for DCMA PA personnel to be involved with surveillance of subcontractors developing or manufacturing critical items.
  - 4.1. [10 U.S.C. 2320](#) provides subcontractors at all tiers the same protection for their rights in data as is provided to prime contractors. The law permits a subcontractor to transact directly with the Government matters relating to the validation of its asserted restrictions on the Government's rights to use or disclose technical data.
  - 4.2. The Government does not require contractors to have their subcontractors or suppliers at any tier relinquish rights in technical data to the contractor, a higher tier subcontractor, or to the Government, as a condition for award of any contract, subcontract, purchase order, or similar instrument except for the rights obtained by the Government.
5. There is a prohibition in law on contractors limiting subcontractor sales directly to the United States. DCMA PA personnel should identify and attempt to correct any effort by a contractor to limit Government access to information used to purchase spares and repairs directly from a subcontractor supplier at any tier. These efforts typically consist of inaccurate identification of design ownership on bills of materials and parts lists, and often consist of minor or inconsequential changes to a supplier's part to establish ownership rights.

The PA personnel should determine the extent to which value was added by the contractor and challenge any attempt to improperly establish data rights or limit procurement options. Government and subcontractor rights are established in law at [10 U.S.C. 2402](#) as summarized below:

- 5.1. The contractor will not enter into any agreement with a subcontractor under the contract that has the effect of unreasonably restricting sales by the subcontractor directly to the United States of any item made or furnished by the subcontractor.
- 5.2. The contractor will not act to restrict unreasonably the ability of a subcontractor to make sales of any item to the United States.
- 5.3. This section of law does not apply to a contract that is for an amount below the simplified acquisition threshold.
6. For commercial items contracts, the contracting officer is to presume that the items were developed exclusively at private expense and Government rights are therefore limited.
  - 6.1. In the case of a challenge to a use or release restriction that is asserted with respect to technical data of a contractor or subcontractor under a contract for commercial items, the contracting officer shall presume that the contractor or subcontractor has justified the restriction on the basis that the item was developed exclusively at private expense, whether or not the contractor or subcontractor submits a justification.
  - 6.2. Government rights to technical data under commercial items contracts may be obtained by license as stated in DFARS [252.227-7015](#) Technical Data--Commercial Items License.
7. Refer to FAR [27.305](#) Administration of patent rights clauses, for details regarding Government responsibilities on applicable contracts.

#### **References:**

- a) US Code Title 10, Chapter 137 [10 U.S.C. 2320](#) Rights in technical data
- b) US Code Title 10, Chapter 137 [10 U.S.C. 2321](#) Validation of proprietary data restrictions
- c) US Code Title 10, Chapter 141 [10 U.S.C. 2402](#) Prohibition of contractors limiting subcontractor sales directly to the United States
- d) US Code Title 35, Chapter 18 [35 U.S.C. Chapter 18](#) Patent Rights In Inventions Made With Federal Assistance
- e) US Code Title 41, Chapter 7 [41 U.S.C. 418a](#) Rights In Technical Data
- f) DFARS [227.71](#), Rights In Technical Data
- g) DFARS [252.227-7013](#), Rights in Technical Data--Noncommercial Items
- h) DFARS [252.227-7015](#), Technical Data--Commercial Items License

- i) DFARS [252.227-7017](#), Identification and Assertion of Use, Release, or Disclosure Restrictions
- j) DFARS [Appendix D](#), Component Breakout
- k) DFARS [Appendix E](#), DoD Spare Parts Breakout Program
- l) FAR [27.3](#), Patent Rights under Government Contracts